Supreme Court, U.S.
FILED
MAR 7 2003
OFFICE OF THE CLERK

No. 02-306

In The
Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,

Petitioners

v.

MARIE ANDERSON, *et al.*

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, CONSUMER BANKERS ASSOCIATION, AND FINANCIAL SERVICES ROUNDTABLE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici American Bankers Association, America's Community Bankers, Consumer Bankers Association, and Financial Services Roundtable are national trade associations whose members include national banks chartered by the United States Department of the Treasury, Office of the Comptroller of the Currency (OCC), as well as other types of financial institutions that are closely regulated by federal law.

The American Bankers Association is the largest national trade association of the banking industry in the United States, representing approximately 90 percent of the domestic assets of all American banks. America's Community Bankers is an independent national trade association that represents the nation's nearly 1,200 community banks of all charter types. The Consumer Bankers Association represents more than 750 federally insured banks and other financial institutions that collectively hold nearly 80 percent of all consumer deposits and about 70 percent of all consumer credit held by federally-insured depository institutions. The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to American consumers.

National banks, including those that are members of the *amici* associations, participate in a highly regulated industry. The OCC provides extensive oversight of

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

national banks, including decisions about how many loans to grant, to whom, and at what interest rates. It is not uncommon for *amici*'s members to be the targets of state law litigation involving interest rates on loans, despite this Court's consistent holdings, stretching back 125 years, that the rate of interest that national banks charge can be challenged only through the express federal cause of action found in the National Bank Act, 12 U.S.C. § 86. Such litigation, although baseless, often costs national banks substantial sums of money, money that must be diverted from the funds available to ensure the financial soundness of the bank. Given the burden of such litigation on the safe and sound operation of national banks, *amici* have a strong interest in the proper resolution of the question presented in this case.

SUMMARY OF ARGUMENT

Usury claims against national banks arise under the National Bank Act because that statute establishes a federal interest rate that preempts state interest rates as applied to national banks and creates an exclusive federal cause of action to redress violations of that rate. Respondents' apparent attempt to avoid that federal cause of action by purportedly pressing only a plainly preempted state law claim must be rejected. Interest-bearing loans typically constitute the predominant assets on a national bank's balance sheet and are a primary component of virtually every national bank's income. Consequently, lawsuits under state law usury causes of action in state court that challenge the interest rate paid to a national bank can be a significant impediment to the proper functioning of the national bank.

A. In 1864, Congress created an exclusive and comprehensive federal regulatory regime in the National Bank Act to govern the financial practices of national banks, including the rate of interest charged for loans, and

vested regulatory enforcement authority in the United States Department of Treasury, Office of the Comptroller of the Currency (OCC). The federal government's exclusive regulation of national banks was, in part, a response to certain States' hostility to them. That regulation extends to the rate of interest a national bank may charge. As a matter of federal law, *see* 12 U.S.C. § 85, national banks are authorized to charge interest at the highest of three possible rates. Depending on the location of the national bank, it may be that none of those rates is a rate authorized by the law of the State where the borrower is located. Thus, as this Court has recognized, there is "no doubt" that Section 85 preempts state law usury limitations as applied to national banks. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996).

But Congress did more than just create a federal right for a national bank to charge interest up to a federally-prescribed ceiling. Congress also created an express private cause of action against national banks in 12 U.S.C. § 86 for violations of Section 85. This Court has recognized repeatedly that Congress intended the Section 86 cause of action to be the exclusive means of private redress. Respondents' state court challenge to the rate of interest paid to a national bank necessarily arises under that federal cause of action created by the National Bank Act, which preempted and replaced state law usury claims against national banks. The claim thus is one "arising under" the federal cause of action established in Section 86 and, therefore, the action is within the original "arising under" jurisdiction of federal district courts, 28 U.S.C. § 1331, and is removable to federal court under 28 U.S.C. § 1441.

B. That respondents cite only state law in their complaint does not deprive the allegations of the complaint of their federal character. In determining its jurisdiction, a federal court is not bound by the complaint's legal averments but, instead, must look behind the face of the pleadings. That is the settled rule in diversity cases,

where federal courts must exercise jurisdiction over cases in disregard of the face of the complaint when an assessment of the true nature of the case shows that complete diversity exists. The power and obligation of the federal courts to look beyond the pleadings is no different when determining whether a federal court has jurisdiction over a case on the basis that a claim alleged "arises under" federal law.

Plaintiffs are free to choose between a state and a federal cause of action when both exist. But when a plaintiff's state law cause of action and remedy are preempted by federal law and Congress has created an exclusive federal cause of action in their stead, a plaintiff has no choice but to invoke the federal cause of action if he wishes to challenge the underlying conduct. In such circumstances, a complaint nominally alleging violations of the displaced state cause of action can be viewed only as a claim arising under the remaining federal cause of action. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). Although sometimes described as a doctrine of "complete preemption," the circumstances under which a district court may treat a purportedly state law claim as arising under federal law are not predicated upon the substantive breadth of the statute's preemption. The critical question is whether Congress created a federal cause of action to replace any state cause of action, thereby transforming a state cause of action into one "arising under" federal law. Because Section 86 of the National Bank Act does precisely that by creating an exclusive federal cause of action for persons who allegedly paid a national bank an interest rate greater than that allowed by Section 85, claims challenging the rate of interest paid to a national bank necessarily arise under federal law.

C. The nature of the federal interests at stake in adjudicating usury claims against national banks also weighs heavily in favor of federal jurisdiction. The OCC engages in frequent and extensive examinations of every

national bank to ensure compliance with federal law, including the federal limit on interest rates, and requires corrective actions whenever violations are found. These OCC examinations, performed as a component of the OCC's exclusive regulatory and supervisory authority and backed by the threat of significant civil penalties, substantially reduce the risk of national banks engaging in any systemic violations of Section 85 and promote a uniform interpretation of federal law.

Despite the fact that it has been settled for 125 years that state law causes of action challenging the interest paid to a national bank are preempted, such suits in state court are not uncommon. The failure of a court promptly to dismiss such a suit as preempted increases the risk of uncertainty and the cost of the suit, which are both harms that are particularly injurious to national banks intent on limiting financial and reputational risks. It is the experience of *amici* and their member institutions that such a prompt dismissal is less likely to occur in state trial courts. The efforts of the plaintiffs' bar to keep such cases in state court through a variety of not-so-subtle pleading stratagems suggests that they share the understanding that federal courts are more likely to analyze preemption questions correctly more often, and thus dismiss plaintiffs' claims before the costs and burdens of litigation enable a plaintiff to extract a settlement from a national bank. Although erroneous state trial court decisions on preemption can be appealed, such appeals are generally available only after the costs of discovery and litigation have been expended.

Litigation in state courts involving the interest rates paid to national banks is more likely than federal court litigation to lead to a lack of uniformity concerning the requirements of the National Bank Act and the propriety of determinations by the OCC, to the detriment of the national banking system. Although this Court ultimately

remains available to resolve any conflicts between the state and federal courts, the uncertainty of such a discretionary avenue of relief at the end of the litigation defeats Congress's intent to preempt entirely state causes of action challenging interest rates of national banks in favor of a singular federal remedy.

ARGUMENT

A COMPLAINT ALLEGING THAT THE RATE OF INTEREST PAID TO A NATIONAL BANK IS UNLAWFUL NECESSARILY "ARISES UNDER" FEDERAL LAW BECAUSE CONGRESS CREATED AN EXCLUSIVE FEDERAL CAUSE OF ACTION FOR SUCH CLAIMS AS PART OF A BROADER SCHEME TO PROMOTE AND PROTECT THE FINANCIAL SOUNDNESS OF NATIONAL BANKS

Although sometimes described as a doctrine of "complete preemption," the circumstances under which a district court must treat a purportedly state law claim as a claim "arising under" federal law, and therefore within the district court's original jurisdiction, 28 U.S.C. § 1331, is not predicated upon the breadth of a federal statute's preemption. Instead, the critical question is whether Congress has created a federal cause of action to take the place of the purportedly state law cause of action. When Congress has done so, a complaint that invokes the displaced state cause of action necessarily arises under the exclusive federal cause of action and can be removed to federal court by a defendant sued in state court, 28 U.S.C. § 1441. Congress has done just that in Section 30 of the National Bank Act, 12 U.S.C. §§ 85, 86.

Congress intended for usury claims against national banks to arise under the National Bank Act because of the potential adverse effect on the national banking system that could result if suits challenging a critical component of a national bank's operations – its granting of interest-bearing loans – were left in the hands of state courts at the sole discretion of plaintiffs. National banks such as *amici's* members are subject to comprehensive federal regulatory supervision of their interest rates and loan practices. The federal interest in the safety and soundness of such institutions that led to such supervision confirms that Congress intended that challenges to such rates arise under federal law.

A. A Complaint That Challenges The Rate Of Interest Paid To A National Bank "Arises Under" The National Bank Act And Is Removable To Federal Court

In 1864, in the midst of the Civil War, Congress enacted the National Bank Act, ch. 106, 13 Stat. 99 (1864). The Act authorized the creation of national banks "for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874); *see also Mercantile Nat'l Bank v. New York*, 121 U.S. 138, 154 (1887) ("The object of the [Act] was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States.").

Congress expected States and their regulators to be hostile to national banks. *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1393 (1864) (Rep. Washburn) ("it will not do to place [the national banking system] in the power of the States, otherwise you place it in the power of any State which may be opposed to the system to cripple and destroy it"). That expectation was rooted in the attempts by some States to disrupt the operations of previously established national banks. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (discriminatory stamp tax targeted at national bank); 1 Charles Warren, *The Supreme Court*

in United States History 505 (rev. ed. 1926) (giving examples of state laws outlawing national bank). Congress therefore created a comprehensive federal regulatory regime to promote the national banking system and excluded state laws and regulators.

1. Congress provided in the National Bank Act that the rate of interest charged for loans by national banks shall be governed only by federal law

From the outset, Congress vested complete regulatory authority over national banks in the United States Department of the Treasury, Office of the Comptroller of the Currency (OCC). Congress has granted the OCC the exclusive power to authorize the creation of new national banks, *see* 12 U.S.C. §§ 26-27, to establish substantive standards to ensure financial safety and soundness, *see* 12 U.S.C. §§ 84, 1831o, 1831p-1, 3907, to require regular reports from the national banks, *see* 12 U.S.C. § 161, and to redress and punish any violations of the law, or the OCC's regulations or orders, *see* 12 U.S.C. §§ 93, 164, 1818. Congress also required federal regulators and supervisors to engage in regular examinations of national banks for compliance with all banking laws, *see* 12 U.S.C. §§ 481, 1820(d), and provided them substantially exclusive visitorial authority, *see* 12 U.S.C. § 484; 68 Fed. Reg. 6363, 6366-6370 (Feb. 7, 2003). That scheme of exclusively federal regulation was designed to protect national banks from "the hazard of unfriendly legislation by the States." *Tiffany*, 85 U.S. (18 Wall.) at 413. Indeed, even when the substance of a state law is not preempted, the OCC is the only regulatory agency that may enforce the state law against national banks. *See, e.g.*, 12 U.S.C. § 36(f)(1)(B) ("The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency."); *National State Bank v. Long*, 630 F.2d 981, 989 (3d Cir. 1980) ("[E]nforcement of the state statute is the responsibility of the Comptroller of the Currency rather than the State Commissioner."). Of course, not every state law that incidentally applies to national banks is preempted by federal law, *see Atherton v. FDIC*, 519 U.S. 213, 222-223 (1997), but Congress clearly delegated the authority to govern the financial workings of national banks solely to federal regulators.

Interest-bearing loans typically constitute the predominant assets on a national bank's balance sheet and are a primary component of virtually every national bank's income. The OCC extensively regulates most aspects of a national bank's program to loan money, including the amount of money the national bank may lend and the appropriate combination of loans it can make at different rates of interest to account for risk. *See, e.g.*, 12 C.F.R. pts. 3, 25, 30, 32.1, 34. Since the inception of the national banking system, federal law has governed the rate of interest a national bank may charge as part of the federal regulatory scheme. *See Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). In doing so, Congress intended that interest include the full range of payments "compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended," such as "late fees, not sufficient funds (NSF) fees, over-limit fees, annual fees, cash advance fees, and membership fees." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740, 747 (1996) (upholding OCC's regulation, 12 C.F.R. § 7.4001(a), as a reasonable interpretation of the statute). Under 12 U.S.C. § 85, national banks are authorized to charge interest at the greatest of three rates: (1) the rate that state banks are allowed to charge in the State where the national bank is located; (2) under the "most favored lender" doctrine, the rate that any other lender is allowed to charge in the State where the national bank is located; or (3) "a rate of 1 per

centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank" in the district where the national bank is located. *See Marquette Nat'l Bank of Minn. v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 n.19, 309-311, 318 n.31 (1978).[2]

There is "no doubt" that Section 85 preempts state law usury limits as applied to national banks. *Smiley*, 517 U.S. at 744; *see also Marquette*, 439 U.S. at 308 ("The interest rate that [a national bank] may charge *** is *** governed by federal law."). In all instances, state usury limits are preempted; the rates set by a State's law are only relevant to the extent they are incorporated by the National Bank Act. Indeed, in certain circumstances, national banks may legally charge interest rates higher than those allowed to other lenders under state law. For

[2] Section 85 provides in relevant part:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.

example, if the rate based on the Federal Reserve's discount rate is higher than the state rate, national banks may charge the higher rate. Also, because national banks serve customers across state lines, a national bank located in one State is authorized to charge residents of another State the interest rate allowed in the State where the bank is located, even if that rate is higher than the rate permitted under the laws of the customer's State. *See Marquette*, 439 U.S. at 317-318.

2. Congress created a federal cause of action in the National Bank Act for individuals who have paid interest rates that are in excess of those allowed under federal law, and intended that it be an exclusive remedy

Congress did more than just create a federal right for a national bank to charge interest up to a federally-prescribed ceiling. Congress also created an express private cause of action for violations of Section 85 by national banks. Congress provided that a person who has paid an interest rate greater than that allowed by Section 85 "may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association." 12 U.S.C. § 86. In doing so, Congress also established a federal limit on the scope of relief available against a national bank for violation of Section 85. Moreover, Congress specified that that federal cause of action is governed by a two-year statute of limitations. *Ibid.*

This Court has recognized repeatedly that Congress intended that the Section 86 cause of action be the exclusive means of private redress against a national bank that violates the interest rate limits set forth in Section 85. *See Farmers' & Mechanics' Nat'l Bank*, 91 U.S. at 35 ("the

power to supplement [Sections 85 and 86] by State legislation is conferred neither expressly nor by implication" and "would be unreason[able], and contrary to the manifest intent of Congress"); *Barnet v. National Bank*, 98 U.S. 555, 559 (1878) ("The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties."); *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 109 (1919) ("whether transactions by [a national bank] are usurious, and the consequent penalties therefor, must be ascertained upon a consideration of the National Bank Act"). Thus, by creating the exclusive cause of action in Section 86, Congress displaced state law usury claims against national banks with a uniform federal remedy.

3. Respondents' complaint "arises under" the National Bank Act and was properly removed to federal court

A defendant seeking to remove a case from state to federal court need not establish specific congressional intent that a particular federal cause of action be removable, contrary to respondents' suggestion. Br. in Opp. 9. Instead, Congress granted defendants a general right to remove an action to federal court under Section 1441 of Title 28, which specifies that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Because Congress has granted the district courts "original jurisdiction" over all civil actions "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, Congress has evidenced all the intent that is necessary that a state court civil action may be removed to federal court if the action arises under federal law.

As a general rule, a "suit arises under the law that creates the cause of action." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983) (*quoting American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). In the instant case, the National Bank Act creates the cause of action for the underlying conduct alleged in respondents' complaint. That complaint alleges that petitioner Beneficial National Bank, a national bank, and its corporate affiliate charged "excessive interest" on loans made to respondents in violation of Alabama statutory and common law limits on interest, and that respondents "have been injured and damaged" by petitioners' actions. Comp. ¶¶ 59-60. Respondents' allegation that petitioners violated Alabama's authorized interest rate necessarily alleges a violation of federal law – Section 85 – which makes interest charges in excess of state law illegal, at least to the extent that the State in question is the location of the national bank (a fact contested by petitioners, which maintain that they are located in Delaware) and the state law rate is not less than any of the alternative rates authorized in Section 85.[3] That challenge to the rate of interest paid to a national bank necessarily arises under the federal cause of action created by the National Bank Act – Section 86 – that preempts

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[3] Respondents' complaint includes other counts that are based on related allegations concerning the rate of interest charged by petitioners. Comp. ¶¶ 38-57, 63-68. Those claims would also fall within the preemptive scope of the National Bank Act, *cf. Sherman v. Citibank, N.A.*, 679 A.2d 652 (N.J. 1996), *reinstating* 640 A.2d 325 (N.J. Super. Ct. App. Div. 1994) (holding that state cause of action for failing to disclose that state law prohibited late fee charges was preempted by Section 85), but the Court need not address those other counts. If the district court had original jurisdiction over the usury count, then the court could exercise supplemental jurisdiction over all other claims and parties arising from the same case or controversy. *See* 28 U.S.C. § 1367(a).

and replaces state law usury claims against national banks.

Indeed, it is clear that such a claim "arises under" federal law within the federal district court's original jurisdiction because, if respondents' complaint had originally been filed in federal court, it could not have been dismissed for lack of "arising under" jurisdiction.[4] Therefore, removal of the civil action to federal court at petitioners' request was proper.[5]

B. A Complaint Necessarily "Arises Under" Federal Law Even If It Expressly Invokes Only A State Cause Of Action And Fails To Cite The Exclusive Federal Cause Of Action That Was Enacted In Its Stead

Respondents did not cite the National Bank Act as the basis for their usury claim against the national bank, but that omission on respondents' part does not negate federal

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[4] An action can "arise under" Section 1331 even if the allegations of the complaint do not state a claim upon which relief can be granted under federal law, so long as the claim is not wholly insubstantial and frivolous. *See Bell v. Hood*, 327 U.S. 678, 681-682 (1946). If respondents' claims under Section 86 are subsequently dismissed, either because they did not allege a violation of Section 85 or later proceedings show that petitioners in fact did not violate Section 85, the district court would then have discretion to retain or remand whatever state law claims remained, if any. *See* 28 U.S.C. § 1367(c)(3); *Lapides v. Board of Regents*, 122 S. Ct. 1640, 1643 (2002) ("the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance").

[5] If a defendant does not exercise its right to remove the civil action to federal court, the case can proceed in state court. For although it is clear that Congress intended challenges to the interest rates paid to national banks to be brought exclusively under federal law, Congress did not evidence an intent to create exclusive federal court jurisdiction.

jurisdiction. *See Grand Trunk Western Ry. Co. v. Lindsay*, 233 U.S. 42, 48 (1914) (rejecting the argument that a federal statute "may not be applied to a situation which is within its provisions unless, in express terms, the provisions of the act be formally invoked" in the complaint as "manifest[ly] unsound[ ]"). By adopting the Federal Rules of Civil Procedure, the Court expressly declined to adopt common law or "code" pleading rules that require a complaint to allege a "cause of action" or a "theory of the pleadings." *See Davis v. Passman*, 442 U.S. 228, 237 (1979); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219, at 188-194 (2d ed. 1990); *see also Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992) (Easterbrook, J.) ("Instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established consistent with the allegations.").

Moreover, the fact that respondents cited only Alabama state law (Comp. ¶¶ 36, 60) and expressly disclaimed any federal cause of action (Comp. ¶ 31), cannot deprive the allegations of the complaint of their federal character. A federal court is not bound by the complaint's legal averments in determining its jurisdiction. Just as a federal court cannot exercise subject-matter jurisdiction by consent or stipulation, *see Cutler v. Rae*, 48 U.S. (7 How.) 729, 731 (1849), neither can a federal court be deprived of jurisdiction based on "artful" pleadings, *i.e.*, pleadings that are drafted in a manner to avoid an exclusive federal cause of action. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475-476 (1998) (collecting cases). Federal courts have the obligation to look behind the face of the pleadings when determining jurisdiction.

1. Federal courts are not bound by the face of the pleadings in determining federal jurisdiction

Federal courts often are presented with jurisdictional questions that require them to look beyond the manner in which a complaint characterizes an issue or a party. For example, in order to exercise diversity jurisdiction under 28 U.S.C. § 1332, a federal court must determine that there is "complete diversity" between each plaintiff and all the defendants. In making that determination, a federal court may disregard the plaintiff's designation in the caption and text of the complaint of which parties are defendants or plaintiffs and, as a matter of federal law, "realign the parties for jurisdictional purposes according to their real interests." *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 523 (1947). "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941). It is the duty of the federal courts "to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'" *Ibid.* Similarly, a federal court can exercise diversity jurisdiction over a civil action even if one of the defendants named in the complaint shares the same citizenship as the plaintiff, so long as the federal court finds that no colorable claim for relief is available against that particular defendant under state law and all the remaining defendants are diverse from the plaintiff. *See Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 227 U.S. 184, 193-194 (1913); 14 Wright & Miller, *supra*, § 3641, at 173-175. Thus, a non-colorable state law claim alleged in a complaint must be disregarded in determining whether the federal court has jurisdiction over the complaint.

The power of the federal courts to look beyond the pleadings is no different when determining whether a federal court has jurisdiction over a case on the basis that

the claim alleged arises under federal law. This Court explained in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), that it was a "settled principle" that a district court assessing whether a complaint can be removed from state to federal court must "'seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.'" *Id. at* 397 n.2; *see id.* at 408 (Brennan, J., dissenting) ("The federal court must therefore scrutinize the complaint in the removed case to determine whether the action, though ostensibly grounded solely on state law, is actually grounded on a claim in which federal law is the exclusive authority."). Although the Court later confined the result reached in *Moitie* to its particular facts, *see Rivet*, 522 U.S. at 472, the Court at the same time reaffirmed the principle relevant to this case – "[i]f a court concludes that a plaintiff has 'artfully pleaded' claims * * *, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* at 475.

2. A complaint alleging a state law claim and seeking a state law remedy that has been displaced by a federal cause of action necessarily "arises under" federal law

Once Congress creates an exclusive federal cause of action to replace an existing state law cause of action, "any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Rivet*, 522 U.S. at 476 (*quoting Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)). Although plaintiffs are free to choose between a state and a federal cause of action when both exist and may be "masters" of their complaints by bringing their suit under only the state cause of action, *see The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913), that is not so when a plaintiff's state law claim is preempted by federal

law and Congress has created an exclusive federal cause of action in its stead. In such circumstances, a complaint alleging violations of the displaced state cause of action can be viewed only as a claim arising under the remaining federal cause of action.

For example, in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), an employer filed suit in state court seeking an injunction based on the allegation that a union had breached a collective bargaining agreement. Although the employer could have brought its suit under § 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, which creates a federal cause of action for "violation[s] of contracts between an employer and a labor organization representing employees in an industry affecting commerce," the employer did not invoke that cause of action but alleged only a state breach of contract claim. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (describing complaint in *Avco*). This Court, nonetheless, sustained the removal of the claim to federal court because an action enforcing a collective bargaining agreement "is controlled by federal substantive law even though it is brought in a state court." *Avco*, 390 U.S. at 559. Because a claim to enforce a collective bargaining agreement could be brought only under the LMRA's cause of action, it was "clear" that the claim under the collective bargaining agreement was "one arising under the 'laws of the United States' within the meaning of the removal statute." *Ibid.*

That is not to suggest, as do respondents (Br. in Opp. 18), that the "artful pleading" doctrine applies only when a federal statute has a broad preemptive scope. Although sometimes described as a doctrine of "complete preemption," the circumstances under which a district court may treat a purportedly state law claim as arising under federal law are not predicated upon the substantive breadth of the statute's preemption. Indeed, as this Court's cases under

the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, make clear, the critical question is whether Congress provided the plaintiff with a federal cause of action against the defendant to replace the state cause of action. Thus, in *Franchise Tax Board*, the Court held that certain state law claims did not "arise under" federal law even though it "may well be" that ERISA preempted the challenged state conduct. The Court explained that the complaint did not "arise under" federal law because ERISA did "not provide anyone * * * with an express cause of action for a declaratory judgment on the issues in this case." 463 U.S. at 26. By contrast, in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), the Court held that when a plaintiff's common law contract and tort claims against his employer relating to an employee benefit plan were preempted by ERISA and ERISA also "provides an exclusive federal cause of action for resolution of such disputes," *id.* at 62, then the "suit, although it purports to raise only state law claims, is necessarily federal in character" and is "removable to federal court by the defendants," *id.* at 67.

Thus, this Court's cases establish that, where federal law provides the exclusive cause of action by preempting state causes of action and by creating a federal private right of action, a federal court must treat as federal a complaint purportedly raising only the displaced state cause of action. As discussed above, *see* pages 8-12, *supra*, the National Bank Act does precisely that by preempting all state causes of action for persons who allege they paid a national bank an interest rate greater than that allowed by Section 85, and by creating in Section 86 a federal cause of action for the claim.

C. Removal To Federal Court Of Complaints Challenging The Rate Of Interest Charged By National Banks Furthers The Comprehensive Regulatory Scheme Established By Congress Over National Banks By Promoting Uniformity And Reducing The Costs Of Litigation

As demonstrated above, the straightforward test established by this Court to determine "arising under" jurisdiction when a plaintiff attempts to rely on a state law claim rather than a federal cause of action is whether that federal law preempts the state cause of action and creates a private federal cause of action in its place. That test, met here, comports with the Court's insistence that "jurisdictional rules * * * be clear," so that judicial and litigation resources are not unnecessarily expended on procedural matters. *Lapides v. Board of Regents*, 122 S. Ct. 1640, 1645 (2002); *see also Burnham v. Superior Ct.*, 495 U.S. 604, 626 (1990) (plurality opinion of Scalia, J.). The need for such clarity is particularly important in the removal setting, where a district court's determination that removal is not proper is rarely subject to appellate review. *See* 28 U.S.C. § 1447(d).

The Court also has suggested that the question whether an action "arises under" federal law may include a consideration of "the *nature* of the federal interest at stake" in light of "the demands of reason and coherence, and the dictates of sound judicial policy," and "with an eye to practicality and necessity." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 814 n.12, 810 (1986). Although *amici* believe that such a factor is not pertinent here because the statutory language of the National Bank Act is so clear, to the extent such considerations are relevant, the nature of the federal interest at stake in adjudicating usury claims against national banks in federal court weighs heavily in favor of federal jurisdiction.

1. The OCC engages in extensive examinations of each national bank to ensure compliance with federal law, including federal limits on interest rates, and requires corrective action whenever violations are found

There are more than 2,100 national banks throughout the country. Those institutions are responsible for more than 58 percent ($3.8 trillion) of the total assets of all banks in the United States. *See* Comptroller of Currency, *Performance and Accountability Report: Fiscal Year 2002*, at i (2002). Although each national bank is a private association with shareholders that is operated for profit, each national bank also is a federal instrumentality closely supervised and regulated by the OCC to ensure that the bank engages in safe and sound financial practices. *See* 12 U.S.C. §§ 93(b), 1818(b). That degree of regulation is, of course, of paramount importance to the Nation's economy, which relies on the financial safety and soundness of those institutions.

Perhaps the "most effective" tool for federal regulation of banking is "the broad visitorial power of federal bank examiners." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963). Whenever the OCC deems it necessary, but in most cases at least once each year, *see* 12 U.S.C. § 1820(d), it may order "a thorough examination of all the affairs" of a national bank. 12 U.S.C. § 481. During Fiscal Year 2002, the OCC conducted more than 3,100 examinations of national banks. *See Performance and Accountability Report, supra*, at 9. In addition, national banks are required to furnish detailed periodic reports of their operations. *See* 12 U.S.C. § 161. "In this way the [federal regulatory] agencies maintain virtually a day-to-day surveillance of the American banking system." *Philadelphia Nat'l Bank*, 374 U.S. at 329. Indeed, for the largest national banks, the concept of day-to-day oversight is literally true, as the OCC has placed "full-time teams of resident examiners on site at the largest banks – as many

as 40 or 50 examiners at the very largest." Comptroller John D. Hawke, Remarks before the Risk Management Association's Capital Management Conference (June 6, 2002) (available at www.occ.treas.gov/ftp/release/2002-49.txt); *see also Performance and Accountability Report, supra*, at 10 (describing distribution of examiners based on bank size and assets). This system of federal supervision is exclusive. Except under very narrowly defined circumstances, state regulators may not examine the records of a national bank, *see* 12 U.S.C. § 484; 68 Fed. Reg. 6363, 6366-6370 (Feb. 7, 2003), and cannot review the OCC's examination reports except at the Comptroller's "sole discretion," 12 C.F.R. § 4.37(c).

Significantly for purposes of this case, the OCC's bank examiners monitor loans granted by national banks, including the interest charged on those loans, as part of their general safety and soundness examinations. *See generally* Comptroller of Currency, *Comptroller's Handbook: Assets: Loan Portfolio Management* (Apr. 1998); Comptroller of Currency, *Comptroller's Handbook: Liquidity and Funds Management: Interest Rate Risk* (June 1997).[6] In addition, as part of each national bank's consumer compliance review, the records of the national bank are examined "[t]o determine the bank's compliance with Interest on Loans" requirement by "review[ing] loan reports or a sample of loans (originated since the preceding examination) to determine that the rates charged comply with 12 USC 85." Comptroller of Currency, *Comptroller's Handbook: Consumer Compliance Examination: Other Consumer Protection Laws and Regulations* 3, 6 (Oct. 1996); *see also* Comptroller of Currency, *Comptroller's Handbook: Consumer Compliance Examination: Community Bank Consumer Compliance* 11, 44 (Nov. 2000) (similar).

[6] The *Comptroller's Handbook* is a series of publications issued by the OCC that "was developed primarily for national bank examiners to use in supervising banks, but has grown to serve other users as well. It educates readers about bank activities and provides a guide to how the OCC expects banks to conduct different activities." Comptroller of Currency, *Comptroller's Handbook: Bank Supervision and Examination Process: Introduction* 5 (July 1994).

When "violations of law or regulations are identified," national banks must take "corrective action." *Other Consumer Protection Laws, supra*, at 3, 7; *see also* Comptroller of Currency, *Comptroller's Handbook: Consumer Compliance Examination: Overview* 4, 15-16 (Aug. 1996). In addition, the OCC has the authority to impose civil penalties for each day during which a violation of Section 85 continues, ranging from $5,000 a day for an unintentional violation to $1,000,000 a day for knowingly committing such a violation for substantial pecuniary gain. *See* 12 U.S.C. § 93(b). The "frequent and intensive" examinations, *Philadelphia Nat'l Bank*, 374 U.S. at 330, performed by the OCC significantly reduce the risk of national banks engaging in any systemic violations of Section 85, while ensuring a uniform interpretation of federal law through a unified enforcement scheme.

2. Litigation in state courts involving the interest rates paid to national banks is likely to lead to a lack of uniformity concerning the requirements of the National Bank Act and the propriety of determinations by the OCC, thereby increasing the costs and uncertainty of litigation

a. Unfortunately, civil actions in state courts against national banks concerning the rates of interest paid, such as the one brought by respondents, are not uncommon occurrences. Such cases rarely generate reported opinions in state courts, however, because most state trial court opinions are unpublished and, for the reasons discussed below, most such cases are settled if they are not disposed

of early at the trial level.[7] Such suits are often brought purportedly under state causes of action to recover damages in excess of those available under the federal cause of action or to challenge conduct authorized by federal law, even though it has been clear for more than 125 years that such state causes of action are preempted as applied to national banks. *See Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875); *Barnet v. National Bank*, 98 U.S. 555, 558 (1878); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996). Despite the baseless nature of the suits as a matter of federal law, the failure of a state court to dismiss immediately a case as preempted may compel a national bank, ever-conscious of the need to limit risk, to enter into settlements.

It is the experience of *amici* and their member institutions that a prompt dismissal on preemption grounds is unlikely to occur in state trial courts. *Amici* do not suggest that all state trial courts will incorrectly refuse to dismiss preempted claims and remedies, or that all federal district

[7] For examples of complaints filed in state courts against national banks concerning the rate of interest charged that were removed (even if only briefly) to federal court, *see, e.g.*, *Jones v. BankBoston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. 2000); *Matheis v. May Dep't Stores Co.*, 1999 U.S. Dist. LEXIS 21917 (E.D. Mo. May 21, 1999), *rev'd*, 218 F.3d 919 (8th Cir. 2000); *Partin v. Cableview, Inc.*, 948 F. Supp. 1046 (S.D. Ala. 1996); *Fortenberry v. Southtrust Bank of Ala., N.A.*, 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. Mar. 21, 1996); *Hunter v. Rich's Dep't Stores*, 945 F. Supp. 1500 (N.D. Ala. 1995); *Moss v. SouthTrust Mobile Servs., Inc.*, 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. Sept. 22, 1995); *Watson v. First Union Nat'l Bank of S.C.*, 837 F. Supp. 146 (D.S.C. 1993); *Goehl v. Mellon Bank*, 825 F. Supp. 1239 (E.D. Pa. 1993); *Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537 (D. Colo. 1993); *Ament v. PNC Nat'l Bank*, 825 F. Supp. 1243 (W.D. Pa. 1992); *Nelson v. Citibank (South Dakota), N.A.*, 794 F. Supp. 312 (D. Minn. 1992); *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 739 F. Supp. 1338 (W.D. Ark. 1990), *aff'd*, 930 F.2d 608 (8th Cir. 1991); *Beeman v. MBank Houston, N.A.*, 691 F. Supp. 1027 (S.D. Tex. 1988).

courts will always resolve preemption questions correctly. *Amici's* experience, however, has been that federal courts are more likely to analyze preemption questions correctly more often, an experience that may be explained by the differing structural incentives faced by state courts. *See* Karen A. Jordan, *The Complete Preemption Dilemma*, 31 Wake Forest L. Rev. 927, 990 (1996) ("state courts may be less inclined to give full effect to a federal preemption provision" because "a federal preemption provision may harm state citizens by eradicating a state right to a remedy"); *cf. Mazaika v. Bank One, Columbus, N.A.*, 653 A.2d 640, 642 n.3 (Pa. Super. Ct. 1994) (finding no preemption of usury claim against national bank and likening the interest rate charged by a national bank in compliance with the National Bank Act to the conduct of Don Corleone, a fictional organized-crime figure and loan shark), *rev'd*, 680 A.2d 845 (Pa. 1996).

Whatever the reasons, *amici's* perception that state courts are more amenable to plaintiffs' claims against national banks also appears to be shared by the plaintiffs' bar. Many suits against national banks are initially brought in state court and are carefully drafted, as was the complaint in this case, with the apparent goal of preventing removal to federal court based on diversity jurisdiction by limiting the amount in controversy just below $75,000. Comp. ¶ 62 (demanding damages "not to exceed $74,900 per named Plaintiff"); Br. in Opp. App. 11a (same demand in different lawsuit against national bank).

In addition, cases removed from state to federal court on the basis of federal question jurisdiction (excluding prisoner suits) are dismissed before trial 72% of the time, compared with a 31% dismissal rate for federal question suits originally filed in federal court. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System: Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 594 tbl.

1 (1988) (describing data and suggesting various explanations). That substantial disparity suggests that cases with weaker federal claims are originally brought in state court, perhaps in the belief that state courts are less likely to dismiss a plaintiff's claims, which in turn increases the possibility of extracting a settlement from the defendant.

b. The mere existence of a state court decision refusing to find preempted state substantive laws and remedies concerning the rate of interest paid to national banks can create uncertainty and thus add to various forms of risk that are the subject of federal regulation and frequent federal examination. The OCC has concluded that, even if a national bank ultimately prevails in litigation of a claim, the mere act of litigating the claim "can disrupt the operations of a bank, possibly reducing the institution's earnings and capital," by causing "foregone business opportunities, loss of corporate focus, or diminished reputation in the community." Comptroller of Currency, *Comptroller's Handbook: Other Areas of Examination Interest: Litigation and Other Legal Matters* 1 (Feb. 2000). Additionally, according to the OCC, "depositor confidence in an institution may be shaken by litigation against the bank, and may lead to unanticipated loss of both deposits and capital." *Id.* at 3. Because "[r]eal or threatened litigation can pose significant costs to banking organizations," the OCC requires its examiners "to identify any pending or threatened litigation involving the bank, assess the liabilities and any impact from those legal matters, and determine whether the bank is effectively identifying, measuring, monitoring, and controlling those risks." *Id.* at 1. Considering the "likelihood of an unfavorable outcome," the "estimated cost of defending the claim," and "an estimate of the amount or range of potential loss," the examiner must "[d]etermine whether threatened or pending litigation [or] claims * * * against the bank exist and quantify their potential effect on capital, earnings, and financial soundness." *Id.* at 11, 12, 13.

Permitting a national bank to remove to federal court a case concerning the rate of interest it charged reduces the likelihood of error, confusion, and delay and thus reduces the potential effect of such a case on the financial soundness of an institution in an exclusively federally-regulated industry. *See* American Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* 4 (1969) ("Federal question jurisdiction is necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy."); *The Federalist* No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.").

Although erroneous state trial court decisions on preemption can be appealed, such appeals are generally available only after the costs of discovery and litigation have been expended and a final judgment has been entered. National banks are thereby denied one of the primary benefits of preemption – a quick dismissal of preempted state law claims as a matter of law. And although this Court ultimately remains available to resolve any conflicts between the state and federal courts, the uncertainty of such a discretionary avenue of relief at the end of the litigation defeats Congress's intent to preempt state causes of action challenging interest rates of national banks in favor of a singular federal remedy. *See* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of a Definition*, 76 Tex. L. Rev. 1781, 1821-1822 (1998) ("One of the purposes of complete preemption is to vindicate Congress's purported desire not to allow any causes of action in a particular substantive area other than federal causes of

action. Assuming that this intent can be found, it is not enough to respond *** that the Supreme Court can vindicate the underlying statutory purpose through appellate jurisdiction because this will not satisfy the congressional desire to abrogate state causes of action."). Nor does it create the level of certainty necessary for the optimal functioning of a national banking system.

c. In addition, national banks, subject to the pervasive federal oversight of the OCC, have a particular interest in not having state courts second-guess federal agency determinations regarding issues that may affect the national banks' financial safety and soundness. Because the OCC is charged with exclusive governmental enforcement of Section 85, its determination about the scope and meaning of the statute is accorded great deference. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739-741 (1996). Allowing suits in state court to proceed against a national bank on necessarily federal claims over the objection of the national bank could interfere with the OCC's exclusive regulatory jurisdiction by permitting, in essence, collateral attacks on the OCC's determinations.

A case currently pending in Louisiana state court reveals the problems that can result when a state court sits to review bank conduct that is sanctioned by a federal regulatory body. In *Heaton v. Monogram Creditcard Bank of Georgia*, No. 98-8275 (La. Civ. Dist. Ct., Orleans Parish), the plaintiffs brought a class action suit against a defendant alleging violations of state usury laws. *See Heaton v. Monogram Creditcard Bank of Ga.*, 297 F.3d 416, 419 (5th Cir. 2002) (describing litigation). The Federal Deposit Insurance Corporation (FDIC) had previously certified that the defendant was a "bank" for purposes of the Federal Deposit Insurance Act, which determination, *inter alia*, entitled it to deposit insurance, subjected it to federal regulation, and preempted certain state usury laws, 12 U.S.C. § 1831d(a). *See* 297 F.3d at 424. The state court refused to accept the FDIC's certification and held

that whether the defendant was a "bank" entitled to the federal preemption defense was a factual question to be determined by a jury. *Heaton v. Monogram Creditcard Bank of Ga.*, No. 98-8275, Judgment at 3-4 (La. Civ. Dist. Ct., Orleans Parish July 9, 2001). The state court also refused to allow the FDIC to intervene in the litigation to defend its actions. *See Heaton*, 297 F.3d at 423 n.10. On removal by the defendant, the federal district court remanded for lack of jurisdiction, but on appeal, the order was reversed after the intervention of the FDIC in the litigation. *See id.* at 420. (The case is still pending in state court because the federal court of appeals' mandate has not issued due to a pending petition for rehearing). That litigation has been pending for five years, incurring substantial and unnecessary fees and costs, because of the failure of the state court promptly and properly to resolve the question of federal preemption.

While certainly an unusual case procedurally, similar difficulties would arise were a state court to conclude that a practice that was approved by the OCC during the course of its examination of a national bank nonetheless violated the National Bank Act as interpreted by a state court. To maintain the proper roles of federal and state courts, national banks should be permitted to invoke federal court jurisdiction so that inquiry into the soundness of the OCC's judgment can be made, if at all, by federal trial and appellate courts. *Cf. Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871).

From their inception, "National banks have been National favorites." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 411 (1874). In furtherance of its policies of competitive and financially sound national banking system, Congress preempted state law usury causes of action against national banks and replaced them with a single federal cause of action. The "practicality and necessity," *Merrell Dow Pharm.*, 478 U.S. at 810, of a federal forum to vindicate those national policies complements the

legal analysis that demonstrates that civil actions challenging the rate of interest paid to a national bank necessarily "arise under" federal law.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted.

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MARCH 2003